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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

THE BOEING COMPANY,

Plaintiff,

v.

LEONARD ROBINSON, in his official capacity as the Acting Director of the California Department of Toxic Substances Control,

Defendant..

Case No. CV 10-04839-JFW(MANx)

DEFENDANT'S OPPOSITION TO THE BOEING COMPANY'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: April 11, 2011
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Judge: Hon. John F. Walter

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INTRODUCTION

The Boeing Company's lawsuit to overturn California Health and Safety Code Section 25359.20 (SB 990) is a challenge to the State of California's efforts to protect future generations from the mistakes of the past at the Santa Susana Field Laboratory (SSFL) in Ventura County. Declaration of A. Owens, Exh. 1. The Boeing Company (Boeing) seeks to have this Court invalidate a law, the primary focus of which is on ensuring the widest potential land use for the SSFL property. Regulation of land use is a traditional area reserved to the states and their subdivisions, and not for a private party, like Boeing, under the cover of a federal agency, to dictate. SB 990 requires a thorough investigation and cleanup of chemical and radiologic materials that have been left in the remaining buildings, soil and groundwater at the SSFL as a result of decades of nuclear research and rocket development by Boeing and its predecessors.[1] Defendant asks that the Court uphold SB 990 and permit the State to remedy the harmful legacy of an era when the heady prospects for nuclear energy were pursued without an understanding of the public health and environmental consequences – a problem that continues to baffle experts today.

Boeing's challenge to SB 990's constitutionality is particularly hollow in light of the Administrative Orders on Consent ("AOCs") between the State Department of Toxic Substances Control ("DTSC") and the two federal agencies that are also responsible parties at the SSFL: the United States Department of Energy ("DOE") and the National Aeronautics and Space Administration ("NASA"). State's SUF, ¶ 115; Boeing's Memo, at 12, n.6.[2] The State acknowledges that the negotiations that

[1] Throughout this Memorandum, references to "Boeing" should be understood to include its predecessors as the SSFL – *e.g.*, North American Aviation and Rockwell International.

[2] Defendant's Statement of Genuine Issues of Material Fact, which includes the State's responses to Boeing asserted uncontroverted facts, and the State's separate Undisputed Material Facts (beginning at No. 115) is referred to throughout this memorandum as "State's SUF." The State does not interpret the applicable (continued…)

resulted in these AOCs were not without the typical legal posturing from all parties about SB 990's validity. DOE and NASA, however, agreed to put aside their differences with the State and agree to clean up radioactive contamination in, and originating from, Area IV of SSFL and chemical contamination in Areas II and IV. The "cleanup-to-background standard (with appropriate exceptions) has been accepted by the State, DOE, and NASA, with all parties stipulating that such an approach is compliant with SB 990. State's SUF, ¶ 116. Despite DTSC having represented to Boeing that it will execute the same "cleanup-to-background" agreement with Boeing as DOE and NASA will implement (State's SUF, ¶ 116), Boeing continues to seek to overturn the statute.

For several reasons, the finalization of these AOCs has made Boeing's challenge particularly vulnerable. First, Boeing relies on DOE's authority over radioactive cleanup as foundational support for its preemption and intergovernmental immunity arguments, yet DOE has now officially determined that a cleanup-to-background meets SB 990's standards and should be implemented. State's SUF, ¶ 116. Therefore, if DOE "sets the rules" for radiological cleanup, then Boeing should follow the example of this federal agency. Second, the provisions of the AOCs that require a radiological and chemical contamination of the SSFL and surrounding properties establishes that the SSFL has not yet been adequately characterized. Third, the fact that DOE has agreed to clean up the radiological and chemical contamination in Area IV – the portion of the SSFL where Boeing claims all the nuclear research took place (Boeing's SUF, ¶ 11, 12), and where most, if not all, of the radioactive contamination exists today – renders Boeing's assumptions about the amount of contamination it will be obligated to remove so extremely speculative as to be legally inadmissible.

(…continued)
court and local rules to require responses to Boeing's "conclusions of law"; to the extent such responses are required, and for the reasons set forth in this memorandum, the State disputes each such conclusion of law

Fourth, a court – whether federal or state – should not, as a matter of comity, interfere with the jurisdiction of a state legislature's determination as to appropriate land use. The California Legislature intended SB 990 to be the jurisdictional basis for DTSC to enter into administrative cleanup orders with responsible parties at SSFL. Respectfully, this Court should avoid a legal ruling on SB 990 because this statute has provided the authority for the State, DOE, NASA to reach important agreements that preserve future land use options for the SSFL property, while protecting public health and the environment. Finally, it should be noted that Boeing's attempts to minimize the environmental impact of the partial meltdown of one of the SSFL nuclear reactors seem particularly hollow, in light of recent events that prove the lack of consensus on the nature of nuclear meltdowns and the threats they present to the population and the environment.

SB 990 was passed by the California Legislature in response to a long history of inadequate responses by Boeing to the dangers caused by chemical and radiologic contamination resulting from decades of nuclear research and rocket testing at SSFL. As much as Boeing would like to convince the Court otherwise, this case is not about DOE, or about that agency's obligations under SB 990. Indeed, if Boeing's innumerable references to DOE should carry any weight whatsoever, they should militate against Boeing's attack on the statutory basis for the State's execution of stringent administrative orders with the other two responsible parties – *i.e.*, if DOE has taken the lead in negotiating a resolution with California, Boeing should follow DOE's example and agree to similar terms. Claims between the responsible parties on "relative fault" can be resolved through the legal remedy of any apportionment proceeding, as Boeing readily acknowledges. Boeing's SUF, ¶ 109.

Boeing argues that SB 990 is preempted by the Atomic Energy Act (AEA), 42 U.S.C. §§ 2011, *et seq*. In doing so, Boeing inappropriately relies on the rights and defenses that would be accorded the DOE and which Boeing – as a private

company conducting radiological work and as a landowner – is not entitled to assert. While a small portion of the SSFL is owned by the federal government, most of the site is the property of Boeing. *Natural Resources Defense Council v. Department of Energy* (*NRDC*), 2007 WL 2349288, *2 (N.D.Cal. 2007). Boeing also alleges that SB 990 treats the SSFL differently than other federal facilities, ignoring the fact that this is the only facility in the country to have a partial meltdown of a nuclear reactor (*NRDC* 2007 WL 2349288, at *3, State's SUF, ¶ 120), and the more important fact that land no longer owned or operated by the federal government is not a "federal facility."

As to Boeing's assertions that the federal government entirely occupies the field of regulation of nuclear safety concerns, in fact it has long been recognized that there are certain powers to regulate nuclear health and safety issues that have been ceded to the states – *i.e.*, land use. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). Moreover, beyond the traditional land use functions reserved to the States, the 1959 amendments to the AEA established a process by which States are delegated some of the responsibilities of the Nuclear Regulatory Commission in regulating the radiological activities of private companies, such as Boeing, for health and safety purposes. 42 U.S.C. § 2021(b). States that assume these responsibilities, in agreement with the NRC, are known as "Agreement States." Pursuant to the AEA and its delegation from the NRC, California has been such an Agreement State since 1962 and as such, has licensed radiological activity at the SSFL since the 1960's. "Notice of Agreement with the State of California, 27 Fed.Reg. 3864 (Apr. 21, 1962), State's SUF, ¶ 131.

Boeing also asserts that the State has discriminated against Boeing as a federal contractor by applying rules that uniquely burden activity of the federal government and its contractors. However, what Boeing misses in this argument is the obligation of cleanup required of a landowner of contaminated property as a

fundamental principle of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601, *et seq*., as well as traditional common law nuisance principles. *See*, *e.g.*, Calif. Civil Code § 3483 ["Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it."].

Finally, Boeing argues that SB 990 denies it Equal Protection of the Law because some of the cleanup standards of the bill only apply at SSFL. As will be discussed below, the California Legislature is allowed to apply unique requirements to property where it has a rational basis for doing so.

BACKGROUND

Senate Bill 990 was passed by the California Legislature in reaction to a long history of unresolved environmental problems at the SSFL. At its peak, the SSFL was the site of ten nuclear reactors, seven criticality test facilities, the "Hot Laboratory," the "Nuclear Materials Development Facility," and various test and nuclear material storage areas. State's SUF, ¶ 119. The SSFL has experienced accidents and bad waste management practices that have led to contamination of the soil at SSFL by hazardous and radioactive materials. *NRDC*, 2007 WL 2349288, at *3. In July of 1959, the same year the AEA was amended, a serious accident occurred in a sodium reactor at SSFL -- one-third of the fuel being used in the reactor experienced a "partial meltdown." State's SUF, ¶ 120. Radioactive gases were initially contained within the building holding the reactor (there was no containment structure for the reactor itself), but the decision was made to vent these gases to the atmosphere over a period of weeks. State's SUF, ¶ 120. The Hot Laboratory suffered a number of fires involving radioactive materials and at least four of the ten nuclear reactors suffered accidents. SB 990, Sec. 2(c), Owens Decl., Exh. 1. In addition, one of the methods of disposing of highly toxic substances consisted of workers shooting barrels of the material with a shotgun so that they

would explode and burn, releasing some of their contents in the form of gasses and particulates into the air; in the mid-1990s, a similar episode led to the death of two workers at SSFL. State's SUF, ¶ 123.

In 1989, DOE found widespread chemical and radiologic contamination at SSFL and a cleanup program began. SB 990, Sec. 2(h), Owens Decl., Exh. 1. In 1995, the USEPA and DOE entered into a Joint Policy Agreement. SB 990, Sec. 2(h), Owens Decl., Exh. 1. The standards in the Joint Policy Agreement would have required a full characterization of the site and cleanup of the remaining contamination to standards deemed protective by EPA. *Id.* In 2003, DOE announced that it was not going to follow the Agreement and would instead rely on less protective standards. SB 990, Sec. 2(h), Owens Decl., Exh. 1.

In 1996, the decision was made to close the Energy Technology Engineering Center (ETEC), a complex of about 200 buildings in the "Area IV" portion of SSFL; the ETEC facility – the location where much of the nuclear activity at SSFL was conducted – was operated by and on behalf of DOE. *NRDC*, 2007 WL 2349288, at *3. Prior to the 1996 decision to close the ETEC and remove the buildings, Boeing conducted a survey of the contamination in Area IV. *Id.* This survey was seriously flawed, however, a fact the USEPA declared in writing ("[W]e do not believe that Rocketdyne's survey was sufficient to find potentially unknown areas of contamination."). *Id.*, at *4. Thereafter, there was considerable discussion that USEPA should be involved in any future survey at the site, but this did not occur. *Id.*, at *4-5. Ultimately, in September 2000, DOE decided to perform an environmental assessment pursuant to NEPA for the purposes of releasing the ETEC area for unrestricted use, which was largely based on Boeing's survey. *Id.,* at *6.

The environmental assessment was heavily criticized by the USEPA, the State Department of Toxic Substances Control (the Defendant herein), local government, and community groups, in part because it was based on Boeing's survey. *Id.*, at *7-

10. On March 31, 2003, DOE issued a Finding of No Significant [Environmental] Impact, which was challenged in the United States District Court for the Northern District of California, Case No. C-04-04448. On May 2, 2007, the Honorable Samuel Conti issued a permanent injunction, enjoining the DOE from transferring ownership or possession, or otherwise relinguishing control over Area IV, until it has completed an Environmental Impact Statement (EIS) under NEPA. *Id.*, at *22.

In 2007, in response to the long history of inadequate characterization and remediation at SSFL, the California Legislature enacted Senate Bill 990, and the California Governor signed the measure into law as California Health and Safety Code section 25359.20.

ARGUMENT

I. SENATE BILL 990 IS NOT PREEMPTED BY THE ATOMIC ENERGY ACT.

Any analysis of whether Senate Bill 990, enacted in law as California Health and Safety Code Section 25359.20, has been preempted by the Atomic Energy Act must begin with the basic principle that --

> [t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, . . . matter[s] of local concern," the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996), quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985), and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Therefore, the fundamental principle that historic police powers of the States should be accorded respect by Congress and the Courts is engrained in federal jurisprudence, and

should not be disregarded if there is any basis to uphold a particular state statute. Courts should presume that a state legislature "both intended to and did in fact act constitutionally," and therefore should "indulge in any reasonable construction that can save the statute from invalidity. *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004).

Boeing has cited a line of cases beginning with *Pacific Gas*, *supra*, 461 U.S. 190, to support its claim that Senate Bill 990 regulates in a federal occupied field. Reliance upon *Pacific Gas* and its progeny to find SB 990 unconstitutional cannot be reconciled, however, with the principle that an exercise of the states' historic police powers must not be overturned unless there is no other alternative that would operate to uphold a state's legislative power to protect its citizens. *Swann v. Charlotte-Mecklenburg Board of Education*, 312 F.Supp. 503, 507 (W.D.N.C. 1970) ["Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can be interpreted so as not to conflict with the federal Constitution."].

A. The *Pacific* Gas Decision Has Carved Out an Exception for California's Exercise of Its Land Use Authority Through the Enactment of SB 990.

The State does not in any way seek to challenge the holding in *Pacific Gas* -- a decision that, like the case at bar, concerns a facial challenge to the constitutionality of a California statute. Rather, *Pacific Gas* supports California's position that SB 990 legislates in precisely an area – land use – reserved to the States. *Pacific Gas* concerned two portions of the 1976 amendments to the Warren-Alquist State Energy Resources Conservation and Development Act, Cal. Pub. Res. Code §§ 25000-25986. The amendments at issue required a case-by-case determination that adequate capacity will exist for storage of a proposed nuclear plant's spent fuel rods prior to the construction of the plant. The second portion of the amendments

challenged by the plaintiff imposed a moratorium on the certification of new nuclear plants until "'there exists a demonstrated technology or means for the disposal of high-level nuclear waste.'" *Pacific Gas*, 461 U.S. at 198, quoting Cal. Pub. Res. Code § 25524.2. Although both California laws were upheld, the Supreme Court laid down the rule that the federal government has occupied the entire field of nuclear safety concerns. *Pacific Gas*, 461 U.S. at 212. This principle, which Boeing has made the centerpiece of its opposition, is not absolute, however. The Supreme Court added the phrase "except the limited powers expressly ceded to the states." *Id.* On the basis of that proviso, the Supreme Court upheld both California laws because their purpose was "economic" rather than "nuclear safety concerns. *Pacific Gas*, 461 U.S. at 222. The Supreme Court also created an exemption based on a State's exercise of traditional land use authority. *Pacific Gas*, 461 U.S. at 211-212.

Initially, it bears repeating, and emphasizing, that this case is about Boeing's responsibilities as an owner of most of the SSFL property, and the appropriate land use assumptions that should apply to a radiological and chemical risk assessment of that property. It is not about DOE's activities at the SSFL, nor about certain DOE-contracted activities performed by Boeing on DOE property. Boeing would prefer that the Court see only the DOE-aspect of its activities at the SSFL. Yet, there is another aspect to Boeing's radiological activities at the SSFL – the private commercial work undertaken by Boeing's predecessors. Boeing does not contend that its predecessors did nuclear work only for the DOE. Instead, Boeing uses words like "predominantly" and phrases like "vast majority" to describe its predecessors' DOE-work, clearly admitting that these companies also performed private, commercial activity at the SSFL. *See* Boeing SUF, ¶¶ 5, 14 . Boeing's (or its predecessor companies') land ownership at the SSFL site amounted

to 2398 acres of the 2850-acre Santa Susana facility – more than 80% of the site.[3] Boeing SUF, ¶ 5.

It is because of Boeing's status as a landowner of more than 80% of the SSFL that the holding in *Pacific Gas* does not apply to this case. One of the areas of State power expressly recognized by the Supreme Court is its traditional authority to regulate land use, a principle that is notably, but for obvious reasons, ignored by Boeing in its memorandum. After citing the portions of the legislative of the 1965 amendments to the Atomic Energy Act, the Supreme Court said --

> This account indicates that from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation; the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; *the states exercise their traditional authority* over the need for additional generating capacity, the type of generating facilities to be licensed, *land use*, ratemaking, and the like.

Pacific Gas, 461 U.S. at 211-12 [emphasis added].

The thrust of Boeing's allegations relating to SB 990's validity seems concentrated on the question of land use. At pages 25-26 of its memorandum, Boeing argues that SB 990 is discriminatory because the Ventura County General Plan has designated the SSFL area as "open space." *See*, *also*, Boeing SUF, ¶ 85. The Schreiner declaration, submitted by Boeing in support of its land use argument, points out, however, at paragraph 14, that areas of SSFL are *zoned* for agricultural use, but that the General Plan governs any inconsistency with zoning designations. What the Schreiner declaration does not mention, however, is that the term "open

[3] The 2308 acres does not include the 90 acres owned by Boeing that had been used by DOE as the ETEC facility.

space" is defined to include agricultural uses in addition to more traditional "open space" parklands. *See*, California Government Code § 65560(b)(2) ["open-space lands" include "agricultural lands and areas of economic importance for the production of food or fiber . . ."]. In any event, there is nothing in the Ventura County General Plan that prohibits the State from declaring that the chemical and radiological contamination at the SSFL property shall be cleaned up so that its future uses, subject to county zoning restrictions, are unrestricted. Put succinctly, SB 990 does not determine the eventual land use for the SSFL. Recognizing the County of Ventura's authority over specific land use decisions, SB 990 operates to give the County the greatest latitude in determining future use, by ensuring that radiological and chemical contamination shall not interfere with any appropriate use.

Reduced to its essence, Boeing believes that it should determine the anticipated future land use of the entire 2850 acres, not the California Legislature and its Governor. In its Statement of Undisputed Facts, Boeing declares that it has "publicly committed permanently to restrict and dedicate its property at the SSFL to public use as open space . . . a restriction [that] would prevent residential development or agricultural use upon completion of the cleanup." Boeing's SUF, ¶ 84. While it may have made this public commitment, it is not Boeing's place to determine the *permanent* land use of property which it may eventually sell to a private party or public entity.

As the California courts have explained, matters once of local concern can later become a matter of statewide concern as conditions in the state change. *City of Los Angeles v. California*, 138 Cal.App.3d 526, 532 (Cal.Ct.App. 1982). In determining whether matters are of municipal or of statewide concern, the court gives great weight to the legislative purpose and the factors that influenced the legislature to adopt the law. And, any doubt as to whether a matter is of sufficient statewide concern to justify legislative intrusion into an area traditionally regarded a

municipal affair is resolved in favor of the legislative authority of the state. *Id.* at 533, *citing*, *Baggett v. Gates*, 32 Cal.3d 128, 140 (Cal. 1982).

In *Pacific Gas*, the Supreme Court addressed the argument that one of the California statutes at issue in that case "frustrates the Atomic Energy Act's purpose to develop the commercial use of nuclear power," and for that reason is preempted because it "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Pacific Gas*, 461 U.S. at 220 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Court rejected this argument because "the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons." *Id*., at 222.

The same reasoning should be applied to the California Legislature's determination that the future land use of the predominantly Boeing-owned property should be one of two possible scenarios -- suburban residential or rural residential. Boeing does not explain how this land use determination would "frustrate the Atomic Energy Act's purpose to develop the commercial use of nuclear power." The property at issue is not being considered for a potential nuclear facility; it is not currently being used for a nuclear facility of any sort, and it has not been so used for decades. Indeed, the California statutes considered by the Supreme Court in *Pacific Gas* had a more direct impact on potential nuclear energy development, and even that consideration was not sufficient to strike down the laws as unconstitutional.

B. The Federal Government Has Ceded a Portion of its Atomic EnergyAct Authority to California and other "Agreement States" to Enact Laws Such As SB 990.

The Atomic Energy Act is the primary federal law governing the handling of nuclear materials. In 1959, the AEA was amended, *inter alia*, to provide for partnership and joint responsibility between the States and the Atomic Energy Commission (now NRC) with respect to control of radiation hazards associated

with specified nuclear materials 42 U.S.C. §§ 2021(a)(2) and 2021(a)(4). In 1959, Public Law 86-373 amended the AEA by adding Section 274 to the Act, titled "Cooperation with States." 42. U.S.C. § 2021. As originally enacted, subdivision (b) of Section 274 provided the authority for the former Atomic Energy Commission "to enter into agreements with the Governor of any State providing for the discontinuance of the regulatory authority of the [Atomic Energy] Commission under Chapters 6, 7, and 8 and section 161 of the [Atomic Energy] Act," with respect to byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. With the creation of the Nuclear Regulatory Commission (NRC), that agency acquired the authority to enter into these Section 274 agreements with States. Pursuant to the AEA, California and the former AEC entered into such an agreement in 1962. State's SUF, ¶ 131. This Agreement has continued in force upon the creation of the NRC – and for the last fifty years California has shared regulatory authority under the AEA with DOE.

The 1962 Agreement provides that –

> Subject to the exceptions provided in Articles II, III, and IV [of the Agreement], the Commission [then-Atomic Energy Commission] shall discontinue . . . the regulatory authority of the Commission in the State under Chapters 6, 7, and 8, and section 161 of the Act with respect to the following materials:
>
> A. Byproduct materials;
> B. Source materials; and
> C. Special nuclear materials in quantities not sufficient to form a critical mass.

State's SUF, ¶ 132. (The exceptions in Article II and III of the Agreement are not applicable here.)

Article IV, however, is important because of the scope of regulation that is *not* subject to the exception in the 1962 Agreement, and is thereby ceded to California. Along with the delegation of regulatory authority with respect to byproduct materials, source materials, and below-critical mass special nuclear materials, the 1962 Agreement relinquishes the AEC's (now the NRC's) regulatory authority in section 161 of the Atomic Energy Act. Section 161 is a lengthy list of functions of the NRC that is now within the regulatory domain of the State of California --

> [to] establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable . . . to protect health or to minimize danger to life or property; . . . .

State's SUF, ¶ 133. Therefore, because California is an Agreement State, its enactment of rules, regulations or orders to "protect health or to minimize danger to life or property" resulting from byproduct, source or special nuclear material contamination represents an area of enforcement not preempted by the Atomic Energy Act. SB 990 falls squarely within the delegated function.

Boeing has acknowledged the State of California exercised a role in the approval of the decommissioning and release of certain buildings in Area IV of the SSFL, including structures that are within the former DOE-controlled ETEC facility. In September 2007, Philip Rutherford (one of Boeing's declarants) authored a document for Boeing entitled "Radiological Release Process; Process for Release of Land and Facilities for (Radiologically) Unrestricted Use." State's SUF, ¶ 134. This document begins with the statement that "[f]acilities that have been utilized for radiological operations and/or research, are required to be remediated prior to being released for unrestricted use." State's SUF, ¶ 135. Mr. Rutherford further explains, at page 6, that, for Boeing-owned buildings, the State-issued

Radioactive Materials License requires that the State approve remediation of such facilities before they can be released for unrestricted use. State's SUF, ¶ 136.

In response to the State's unquestioned authority, Boeing has argued that the scope of the California's authority under its Agreement State status has been *de minimis*. The relevant inquiry, however, is the *permissible scope* of California's authority as an Agreement State, in light of the language of the 1962 delegation, not how it may have been exercised in the past. Despite Boeing's attempt to load its motion and supporting papers with testimony and other factual material comparing SSFL with other contaminated sites in California and speculating on the amount of contaminated soil that may have to be removed, and regardless of the alleged "political" reasons for SB 990's passage, the only relevant inquiry in this motion is the statute's *facial* constitutionality. The facial constitutionality of a statute is purely a question of law. *United States v. Bynum*, 327 F.3d 986, 990 (9th Cir. 2003) The California Legislature enacted SB 990 because of its concern about radiological and chemical contamination at a site with a notorious history of accidents – both nuclear and chemical – a history unique to any other site in the State. The statute should be upheld as a valid exercise of the State's jurisdiction to prevent unnecessary restrictions on future land use and its authority under the AEA as an Agreement State to oversee the cleanup of decades-old contamination.

C. The Lower Court Decisions Cited by Boeing are Inapposite to this Case.

Boeing also cites certain lower court decisions, beginning with *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008), in support of its argument that Senate Bill 990 impermissibly intrudes into a field of regulation occupied by the federal government. While the principle of federal supremacy under the Atomic Energy Act is upheld in these cases, the particular facts in those decisions are manifestly different than the facts before this Court. Any analysis must begin with California's status as an Agreement State for more than 40 years, and its role in

regulating radiological activities at the Santa Susana Field Laboratory. Second, in SB 990, the California Legislature has declared that any risk assessment at the SSFL must assume one of two particular land use scenarios, both of which can be justified by existing use in the area. This is the asserted linchpin of Boeing's contentions with respect to SB 990's asserted unconstitutionality – that it, an private aerospace company and federal contractor, has legal authority *paramount to a sovereign state* on how much radiological and chemical contamination is allowed to remain in its real property. Third, there are no nuclear reactors, radioactive waste disposal sites, or radiological facilities of any sort existing on the SSFL property. Indeed, virtually all of the property is privately-owned. Boeing's SUF, ¶¶ 5, 6. SB 990 does not affect the *operations* of any DOE facility or any private facility under DOE contract. This case involves California's determination of the foreseeable land uses on the SSFL property shall not be restricted by the continued and unnecessary presence of radiological and chemical contamination. None of the cases cited by Boeing present the same unique set of circumstances.

In *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008), Initiative 297, the Cleanup Priority Act, was a direct attempt to control the licensing, operation and closure of the Hanford Nuclear Reservation. The facility had been constructed by the United States, and utilized by the DOE for the disposal of approximately 450 billion gallons of contaminated water and mixed liquid waste. Washington voters were attempting to regulate DOE's operations at Hanford through the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, a statutory scheme that excludes radiological materials from the definition of "solid waste."

In finding the law preempted, the Ninth Circuit relied on the Washington Supreme Court's opinion that the mixed wastes subject to the initiative could not be regulated either under RCRA or the Washington Hazardous Waste Management Act because both statutory schemes excluded radioactive waste from their purview. Moreover, the Ninth Circuit expressly found that Hanford "figure[d] prominently in

the DOE's waste management plan . . . [because] it is the only federal facility that can accept off-site mixed low-level waste for disposal." *Id.*, at 839. None of these factors applies to the SSFL, which is not a federal facility critical to DOE's waste management plan. Indeed, with the exception of a small amount of acreage that had formerly been used for some DOE operations (and a 41.7-acre portion of Area IV and the 409.5 acres in Area II, both owned by NASA), the SSFL is privately-owned, by Boeing. Boeing's SUF, ¶¶ 5, 6.

In *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001), the State was attempting to control the disposal of waste at an active DOE-owned uranium enrichment facility. Like *Manning*, Kentucky was attempting to utilize its authority under RCRA, a statutory scheme in which radioactive waste is specifically excluded from regulation. The SSFL is not an operating facility, and it is not owned by the DOE. Nor has the United States Government had any ownership interest or operating responsibility for 80% of the land.

In *State of Missouri v.Westinghouse Electric, LLC*, 487 F.Supp.2d 1076 (E.D.Mo. 2007), the Nuclear Regulatory Commission was one of the parties challenging a consent decree between the Missouri and Westinghouse. The district court did discuss the question of whether Missouri could rely on its authority under CERCLA. This was rejected, but on the basis that Missouri has not entered into a CERCLA "cooperative agreement," that would be a requirement prior to conducting response actions at a site that was contaminated with radiological materials. *Id.*, at 1081. Missouri, however, was in a completely different relationship to the federal government than an Agreement State like California. In its discussion of the AEA and the question of preemption, the District Court explained the nature of the federal-state partnership when a State is authorized as an Agreement State. The court then pointed out that "[i]t is undisputed that Missouri has not entered into such an agreement with the NRC." *Id.*, at 1083, n.4. California's status as an Agreement State under the express terms of the AEA gives

it the authority to set the land use standards for the radiological cleanup of the SSFL property, and this is precisely what SB 990 has done.

Unlike California, which has regulatory authority as an Agreement State under the AEA, the states involved in the other cases cited by Boeing in support of preemption either did not have agreement state status, or did not raise that argument. *See Brown v. Kerr-McGee Chemical Corporation*, 767 F.2d 1234 (7th Cir. 1985); *Kerr-McGee Chemical Corporation v. City of West Chicago*, 914 F.2d 820 (1990); and *Skull Valley Band of Goshute Indians v. Nielson*, 215 F.Supp.2d 1232 (D.Utah 2002). Similarly, in a recently-decided case, *Commonwealth of Pennsylvania v. Lockheed Martin Corporation*, 2010 U.S.Dist. LEXIS 8052 (M.D.Pa. 2010), the district court upheld state laws against a claim of AEA preemption because the State was not attempting to impose remediation standards on the nuclear site in question. Because the state law was upheld on this ground, there was no discussion as to whether Pennsylvania's status as an agreement state could also support its argument against preemption.

II. SENATE BILL 990 DOES NOT VIOLATE BOEING'S RIGHT TO EQUAL PROTECTION OR DUE PROCESS.

Boeing contends that SB 990 violates its right to equal protection and due process because it "unjustifiably singles out SSFL for unique burdens that apply to no other site in the State."[4] Specifically, Boeing argues that SB 990 – with its

[4] Boeing's Notice of Motion for Summary Judgment states it is also moving on Counts Seven and Nine, which claim that DTSC's enforcement of SB 990 against Boeing will result in equal protection and due process violations. Boeing's Memorandum in Support of Its Summary Judgment Motion, however, entirely ignores these causes of action. A plaintiff arguing selective enforcement of a valid law must show that defendants' rational basis is a pretext for "an impermissible motive." *See Squaw Valley Development Company v. Goldberg*, 375 F.3d 936 (9th Cir. 2004). Here, Boeing presents no argument or evidence that: (1) it has been singled out for unique regulatory and enforcement treatment; (2) DTSC's actions were arbitrary or irrational; and (3) the proffered basis for a rational basis was a pretext and instead motivated by malignant animosity. *Id.*at 944. To the extent Boeing is arguing that DTSC intends to apply a standard to SSFL that is not applied anywhere else, this argument has no merit. DTSC will accept a cleanup-to-

(continued…)

onerous cleanup requirements and prohibition on selling, leasing or otherwise transferring SSFL land until the cleanup is complete – is not rationally related to a legitimate government purpose. The only basis for SB 990, according to Boeing, is "politics."

It should come as no surprise that legislative acts are sometimes the product of politics and the courts have recognized the power of lobbying to influence legislation. *See Samson v. City of Bainbridge Island*, 683 F. Supp. 2d 1164, 1175 (W.D. Wash. 2010). In *Samson*, plaintiffs asserted that the "real reason" for a city's ordinance was pressure and lobbying from a neighborhood association and, thus, the ordinance violated their right to equal protection. But the court found no case law "that supports the proposition that lobbying by a neighborhood association can not provide a rational basis for passing an ordinance." *Id*. at 1175. "Apparently, Plaintiffs lost, or did not enter, the lobbying contest." *Id*.

Boeing may have lost the lobbying contest when SB 990 was enacted, but that only supports the proposition that SB 990 is rationally related to serving an important legitimate governmental purpose: to address public health concerns regarding a highly contaminated radioactive site. As such, Boeing's equal protection and due process claims must fail.

A. Boeing's Equal Protection Claim Must Fail Because SB 990 Does Not Intentionally, and Without Rational Basis, Treat Boeing Differently From Others Similarly Situated

The equal protection clause of the Fourteenth Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. When a suspect class is not implicated, "the court must determine whether the alleged discrimination is patently arbitrary and bears no rational relationship to a

(…continued)
background standard (which has been used before at other sites throughout the state) as equivalent to SB 990 in stringency. State's SUF, ¶ 116, 139.

legitimate governmental interest." *Vermouth v. Corrothers*, 827 F.2d 599, 602 (9th Cir. 1987); *see Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination.") (internal citations omitted). Indeed, a classification that does not involve fundamental rights "will be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Here, in order to claim a violation of equal protection, Boeing must establish that the California Legislature "intentionally, and without rational basis, treated [Boeing] differently from others similarly situated." *North Pacifica LLC v. City of Pacifica,* 526 F.3d 478, 486 (9th Cir. 2008). A state legislature is allowed wide discretion in establishing classifications to balance interests and remedy perceived problems.

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others."

Id. at p. 316. Persons who attack the rationality of a statute's classification must "negate every conceivable basis which might support it." *Id.* at 316 quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1974). The courts are not to judge the wisdom, fairness or logic of a legislative classification. *Id*. at p. 313. Where there are "plausible reasons" for the classification, judicial review is complete. *Id*. at pp. 313-314.

1. The Equal Protection Clause Does Not Require Properties To Be Treated Equally.

Boeing contends that SB 990 singles out SSFL for more onerous cleanup rules than any other site in the State even though SSFL "does not differ in any meaningful respect." Boeing's Motion at 32. In support of this contention, Boeing points to McClellan Air Force Base in Sacramento, Lawrence Livermore National Laboratory outside of San Francisco, and Pratt & Whitney/UTC near San Jose as examples of sites that, like SSFL, are located near population centers and exhibit both radioactive and chemical contamination.

First, Boeing cannot conclusively establish that SSFL is similarly situated to other sites because SSFL has not yet been fully characterized. State's SUF, ¶ 117. The proximity of other sites contaminated with chemical and radioactive waste to population centers does not necessarily mean that such sites are similarly situated to SSFL. Each property is unique and in order to make a true "apples to apples" comparison, SSFL must be fully characterized.

Second, even if Boeing can establish that SSFL is similarly situated to other cites in the state, the equal protection clause does not require properties to be treated equally. "The equal protection clause relates to equality between persons . . . rather than between areas and . . . territorial uniformity is not a constitutional prerequisite." McGowan v. State of Md., 366 U.S. 420, 427 (1961); accord Gypsum Res., LLC v. Masto, 672 F. Supp. 3d 1127, 1142 (D. Nev. 2009) ("The Fourteenth Amendment does not prohibit arbitrary discrimination between lands, but only between persons.") SB 990 targets the SSFL site – not a particular person – and the prescription of differing cleanup procedures for different geographic areas appropriately falls within the realm of legislative discretion. In fact, the legislature has exercised such discretion many times before. SSUF [cite other statutes.] Accordingly, SB 990 does not discriminate between persons and there is no equal protection violation.

2. SB 990 Is Rationally Related to A Legitimate Governmental Purpose

Even assuming that SB 990 treats Boeing differently from others similarly situated, this differential treatment is rationally related to a legitimate governmental purpose. SB 990's legislative findings are determinative here. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 ("In an equal protection analysis, the Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.")

SB 990 was enacted in response to significant public health concerns regarding exposure to radioactive and chemical waste. As detailed in SB 990's legislative findings and history, SSFL presented the legislature with the following "unique circumstances:"

- At its peak, SSFL was the site of ten nuclear reactors, a sodium burn pit where sodium-coated radioactively contaminated objects were openly burned, a plutonium fuel fabrication facility, a uranium carbide fuel fabrication facility, and a Hot Lab used for remotely cutting up irradiated nuclear fuel.
- SSFL is the only facility in the country to experience a partial meltdown of nuclear reactor. Radioactive gases were vented to the atmosphere over a period of weeks. Scientists estimate that the amount of radioactivity emitted could have been as much as 240 times that released from the Three Mile Island accident. Recent studies conclude that this accident may have caused hundreds of cancer cases in the Los Angeles Area.
- Bad waste management practices at SSFL led to large amounts of toxic chemicals and radioactive waste to be released into the soil and groundwater. One method for disposing of highly toxic substances

consisted of workers shooting barrels of the material with a shotgun so that they would explode and burn, releasing some of their contents in the form of gases and particulates into the air; in the mid-1990s, a similar episode led to the death of two workers at SSFL.

- Studies show that cancer rates in SSFL's surrounding communities increase as one moves closer to the site.

[State's SUF, ¶¶ 119-125, SB 990 §2].

SB 990 further reflects the public's concern regarding SSFL's piecemeal cleanup approach and inadequate characterization. [State's SUF, ¶ 126, SB 990 §2.] Again, as detailed in the legislative findings, DOE had commenced cleanup at SSFL, but declined to follow standards deemed protective by EPA. [State's SUF, ¶ 128, SB 990 §2.] Although EPA declared that under the circumstances, SSFL would only be safe for day hikes, DOE insisted on an "unrestricted release" for SSFL, meaning that "families could purchase homes built on soil contaminated with radionuclides from past meltdown and other past accidents." [State's SUF, ¶ 19, SB 990 §2, bill report.] The environmental assessment performed at SSFL was also found to be inadequate. As noted in SB 990's legislative history, on May 2, 2007, the Honorable Samuel Conti held that DOE violated the National Environmental Policy Act and permanently enjoined DOE from transferring ownership or possession, or otherwise relinquishing control over Area IV, until it completed an Environmental Impact Statement. [State's SUF, ¶ 130, SB 990 bill report.] Hence, SB 990 was enacted to respond to remediation efforts at SSFL that "were marred by inconsistent standards and contradictory regulatory responsibilities." [State's SUF, ¶ 127, SB 990, bill report.]

Although only one is required, as stated, SB 990 recites several legitimate bases for SB 990's stringent cleanup standards, consolidation of regulatory authority, and prohibition on land transfer. And, SB 990 is rationally related to

these purposes. The legislature could rationally believe that SSFL presented a threat to public health and safety and that imposing a stringent cleanup standard via a conservative land use assumption would minimize that threat while ensuring that the land is unrestricted for future use. The legislature was also properly concerned about the piecemeal regulatory oversight at SSFL and SB 990's consolidation of authority into one regulatory body (DTSC) is rationally related to addressing that concern. The facts presented to the legislature further reflect a concern that SSFL would not be cleaned up in a manner fully protective of public health and, thus, SB 990's requirement that SSFL be thoroughly remediated prior to any sale, lease or transfer of all or any part of the property was rationally related to protecting the surrounding community and public health.

Boeing points to statements by DTSC staff to supports its assertion that no technical, scientific or environmental basis exists for singling out SSFL. But, pointing to other sites and statements by DTSC do not negate the findings presented to the Legislature. "Where there was evidence before the legislature reasonably supporting the classification, litigants may not produce invalidation of the legislation merely by tendering evidence in the court that the legislature was mistaken." Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. at 464. Here, Boeing presents no evidence that the legislative facts upon which SB 990 is based "could not reasonably be conceived to be true by the governmental decisionmaker." Vance v. Bradley, 440 U.S. 93, 111 (1979).

Boeing further contends that SB 990 will result in a more burdensome, time consuming, and expensive cleanup process than is required and may even result in "significant adverse consequence." As stated, it is speculative to make any determination regarding the effect of SB 990's cleanup standards on SSFL because the site has not yet been fully characterized and no remedy has been selected. [State's SUF, ¶ 117] And, even assuming Boeing is correct, states are not required to convince the courts of the correctness of their legislative judgment. Minnesota v.

Clover Leaf Creamery Co., supra, 449 U.S. at 464. A legislature's action will be upheld as long as they bear a rational relationship to a legitimate governmental purpose. "The action does not have to be the wisest or most efficient option for government action." Comm'n Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 710 (9th Cir. 2009). As the Supreme Court has emphasized, a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." Federal Communications Comm'n, supra, 508 U.S. at 315. Boeing's experts in the scientific community may dispute SB 990's cleanup standard, but the legislative findings reflect the legislature's rational basis for believing that SB 990 would protect the health and safety of the surrounding community. For equal protection purposes, a "legislature is not obligated to make a decision based on cutting edge research." See City of Los Angeles v. County of Kern, 509 F. Supp. 2d 865, 878-81 (C.D. Cal. 2007) vacated on other grounds 581 F.3d 841 (9th Cir. 2009).

The public health, safety and environmental concerns SB 990 intended to address constitute rational bases for treating SSFL and Boeing differently than others similarly situated. Therefore, as a matter of law, Boeing cannot establish a cause of action for the denial of equal protection.

B. Likewise, Because SB 990 Advances A Legitimate Governmental Purpose Likewise, Boeing's Due Process Violation Must Fail.

The Supreme Court has "long eschewed … heightened [means-ends] scrutiny when addressing substantive due process challenges to government regulations" that do not impinge on fundamental rights. *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008). Accordingly, the "irreducible minimum of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose." *Id*.

As stated, Boeing cannot reasonably argue that the Legislature failed to advance any legitimate government purpose through SB 990. There is nothing

irrational about a government's decision to cleanup a property to the fullest extent possible to protect public health and safety. To the extent Boeing brings a substantive due process claim because it was "singled out," this claim is subsumed by its equal protection claim. *See Gypsum Resources, LLC v. Masto*, 672 F. Supp. 2d 1127, 1146 (D. Nev. 2009).

Boeing further asserts that SB 990 retrospectively imposes onerous requirements based on legislative findings regarding past activity. Essentially, Boeing faults SB 990 for creating liability for events that occurred many years before its enactment. Cases are clear, however, that:

> "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976). Here, SB 990 does not impose a new liability on Boeing. California courts have long-recognized that land ownership carries certain social obligations that cannot be avoided. *See Leslie Salt Co. v. San Francisco Bay Conservation and Dev. Comm'n*, 153 Cal. App. 3d 605, 622 (Cal. Ct. App. 1984) (holding that "liability and the duty to take affirmative action [to control pollution] flow . . . from [a landowner's] very possession and control of the land in question. [Citation omitted.]) Boeing's liability under SB 990 is thus consistent with the obligations that are inherent in property. Furthermore, the obligation of a landowner of contaminated property to address the release or threat of release of hazardous substances from the facility is a fundamental principle of California's Hazardous Substances Account Act (the "State Superfund Law"), Cal. Health & Safety Code §§ 25300, *et seq.*[5] and

[5] The State Superfund Law (Chapter 6.8 of Division 20 of the California Health and Safety Code) is referred to in the opening paragraph of SB 990 as California's statutory authority for the cleanup of the SSFL.

CERCLA. Like CERCLA and, SB 990 intended to apply retroactively and acted purposefully to allocate the cost of hazardous waste cleanup at SSFL to those who were responsible for creating the contamination. Again, the proper inquiry is whether the legislature acted in an arbitrary and irrational way in enacting SB 990 and "it is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Usery v. Turner Elkhorn Mining Co*., *supra,* 428 U.S. at 19. Accordingly, Boeing's due process claim must fail.

III. THE DOCTRINE OF INTERGOVERNMENTAL IMMUNITY DOES NOT INSULATE BOEING FROM THE REQUIREMENTS OF SB 990.

Boeing asserts that SB 990 should be struck down because Boeing is entitled to the protection of intergovernmental immunity. Essentially, Boeing is arguing that it is allowed to step into the shoes of the federal agencies it has worked for and with, and be immune from any potential claim or suit by the State of California. This assertion is flawed in three major ways. First, as spelled out above, the two agencies that Boeing seeks to step into the shoes of, NASA and DOE, have already entered into AOCs with DTSC that are "compliant with SB 990". Second, Boeing ignores the fact that it has liability at the site not because of its status as a federal contractor, but because it owns the land where hazardous substances have been released, and that it used nuclear materials in work not performed for the federal government. Finally, the cases cited by Boeing regarding the State's lack of authority to address nuclear safety and health issues are not persuasive, as the those cases deal with states that were not agreement states, as California is.

A. The Doctrine of Intergovernmental Immunity Does Not Apply Because There is No Interference with Federal Activity.

Boeing's right to assert the intergovernmental immunity doctrine is derivative -- the doctrine applies to state regulation of the federal government, and in limited situations, to those with "whom it deals." *North Dakota v. United States*, 495 U.S. 423, 438 (1990). Intergovernmental immunity is implicated when a state regulation directly interferes with the activities of the Federal Government. *See*, *id.* at 437-438. To the extent Boeing is entitled to assert the doctrine at all, it is based on its activities at SSFL it conducted on behalf of two federal agencies, NASA and DOE, and the predecessors to those two agencies. Boeing Memo at 5, 8, 15, 25. Yet, as Boeing concedes, those two agencies have joined in administrative orders with DTSC. Boeing Memo at 11-12. Since California seeks only to have Boeing comply with SB 990 in the same manner as the federal government has already agreed to, it can hardly be argued that the defendant is interfering with the activities of the federal government. Accordingly, as SB 990 does not interfere with any federal activities, the doctrine of intergovernmental immunity does not apply.

B. Boeing Is Liable Under SB 990 As A Landowner, and For Its Work Performed for Non-Government Entities.

Boeing is required to comply with SB 990 not because it is a federal contractor, but because it is a landowner and also held a radioactive materials license from California. Boeing Memo at 6, Boeing SUF ¶ 25. Any owner of a facility where hazardous substances have been released is liable for the costs of cleanup under the state Health and Safety Code section 25323.5, which incorporates the liability standards of CERCLA section 104(a), 42 U.S.C. § 9607(a). Boeing concedes that it owns a substantial portion of SSFL (Boeing Memo, at 4) and that hazardous substances have been released there. Boeing Memo, at 8. While it is true that neither Boeing nor DTSC has been able to distinguish the contamination caused by federal activity on one hand, and non-federal activity on the other, Boeing also recognizes that its operations may have

resulted in some contamination from non-federal activity at the site. Boeing Memo, at 8. Whether as an owner of the property where hazardous substances have been released, or as an operator engaged in non-federal activity at the same site, Boeing falls within the class of persons that are responsible for the remediation of hazardous substances. California Health and Safety Code section 25323.5; CERCLA § 104(a) (42 U.S.C. § 9607(a).

C. Boeing Is Not Being Singled Out for Its Work As a Federal Contractor.

The Supreme Court has held that for the doctrine of intergovernmental immunity to apply, it must be based on the federal contractor's relationship to the federal government. *North Dakota* at 437-438; *see, e.g., United States v. County of Fresno*, 429 U.S. 452, 462-464 (1977). Boeing asserts that it is entitled to the protection of the doctrine because SB 990 discriminates against it in the law's requirement that contamination at SSFL resulting from work it performed on behalf of the federal government be cleaned up under particular standards. Boeing Memo at 25-26.

SB 990 does not apply to Boeing, however, because of its status as a federal lessee, federal contractor, or an entity providing services to federal agencies. The cases cited in Boeing's memorandum all concern an ongoing relationship, not a past connection. See, *Union Oil v. Minier*, 437 F.2d 408, 411 (9th Cir. 1970) (state tried to regulate ongoing development of federal lands for oil production through a private lessee in a way that would frustrate federal power); *Black Hills Power and Light Co. v. Weinberger*, 808 F.2d 665. 666 (8th Cir. 1987) (state tried to dictate which power company could contract for electricity with United States Air Force Base); *Phillips Chem. Co. Dumas Indep. Sch. District*, 361 U.S. 376 (1960) (state levying heavier tax burden on current lessee of federal agency than on private landowners); *Moses Lake Homes v. Grant Cnty.*, 365 U.S. 744 (1961) (state levying

heavier tax burden of current lessee of federal agency than on private landowners). Boeing asserts that because contamination may have occurred while it was performing work on federal contracts, the doctrine applies. Boeing Memo, at 27. But the federal activity that Boeing refers to has long ago ceased, and Boeing has not asserted that anything in SB 990 regulates in a way that interferes with ongoing federal activity.

The reasoning of the Supreme Court in the *North Dakota* case, also cited by Boeing, seems much more instructive here. In *North Dakota*, the state attempted to enforce a requirement that out of state suppliers of liquor attach particular labels to their products destined for United States Air Force Bases within the state. These labels required the payment of a fee to the state. *North* Dakota, 495 U.S. at 428-429. The United States brought the action asking for declaratory relief on grounds that the Supremacy Clause had been violated. The Court held, *inter alia*, that the state regulation did not violate the doctrine of intergovernmental immunity as long as the requirement was not applied to the suppliers because of the "object's status as a Government contractor or supplier." *Id.* at 438.

Here, SB 990 applies to Boeing to the extent the property it owns is contaminated with hazardous substances, or conducted non-federal activity, not because it was and is a government contractor. DTSC is merely seeking to have Boeing take responsibility for contamination on the property that it owns, or for its own non-federal operations, just as DTSC would seek to hold any other owner or operator responsible for cleaning up its property if it was contaminated with hazardous substances (as DOE and NASA have already agreed to do for the property for which they are responsible.)

Boeing cites to *Goodyear Atomic Corp v. Miller*, 486 U.S. 174 (1988), and *Hancock v. Train*, 426 U.S. 167 (1976), in further support of its argument that SB 990 is unconstitutional because of the doctrine of intergovernmental immunity. Boeing Memo, at 24, 25. Assuming, arguendo, that all of Boeing's activity at the

SSFL was performed as a federal contractor, both of the cited cases clearly hold that a state regulation of federal activity violates the intergovernmental immunity doctrine only when the regulation has not been authorized by Congress. *Goodyear Atomic Corp.* at 181, and *Hancock v. Train* at 181. In the AEA, Congress has specifically authorized Agreement States like California to oversee the aspects of the health and safety of nuclear materials subject to its authority. The AEA states that:

> During the duration of such an agreement it is recognized that the States have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

42 U.S.C. § 2021(b).

SB 990, which seeks to protect the health and safety of workers and the residents living in nearby communities, is a proper exercise of that federally-permitted authority.

D. The AEA and CERCLA Allow California to Regulate Boeing as to Nuclear Health and Safety.

In furtherance of its intergovernmental immunity argument, Boeing also claims that SB 990 is not authorized by CERCLA. Boeing Memo, at 32. Since SB 990 is authorized by the AEA, it is not necessary to determine if SB 990 is also authorized by CERCLA. The AEA permits Agreement States, like California, to impose cleanup standards like SB 990, and Boeing, a private landowner, has been under the regulatory control of the State from the time its Radioactive Materials License was issued.

Even if the AEA did not authorize the California legislature to create SB 990, CERCLA specifically allows states to have their own laws regarding the cleanup of hazardous substances. 42 U.S.C. § 9614(a). Boeing cites *U. S. v. Kentucky*, 252 F.3d 816 (6th Cir. 2001), in support of its argument that CERCLA does not authorize the State of California to regulate radiological waste. As noted in Section

I, *supra*, *U. S. v. Kentucky* is a RCRA, not a CERCLA, case. The *U.S. v. Kentucky* case is completely inapposite to Boeing's intergovernmental immunity argument. First, unlike the facts in *Kentucky*, it is Boeing, a landowner and state licensee, and not the DOE, that is before the court in this action and seeks to assert this immunity. Second, in contradiction to RCRA, CERCLA does include radionuclides within its definition of hazardous substances. 40 C.F.R. Part 302, Table 302.4.[6] In fact, the California Legislature specifically recited that SB 990 is an exercise of the State's authority under the State Superfund Law, which incorporates the CERCLA standards.[7] And CERCLA specifically permits states to impose liability or requirements with respect to the release of hazardous substances with the State. 42 U.S.C. § 9614 (a).

Boeing also cites to *U.S. v. Manning*, 434 F. Supp. 2d 988 (E.D. Wash. 2006, *aff'd*, 527 F.3d 828.) in support of its argument that the waiver of immunity in CERCLA section 120(a)(4), 42 U.S.C. § 9620(a)(4), has some application to its own ability to claim immunity. The *Manning* case, like the *Kentucky* case, involved a DOE facility owned by the federal government, and did not involve a federal contractor, indeed, it is a preemption case and does not involve intergovernmental immunity. Boeing presents no authority for the principle that the waiver language in section CERCLA section 120(a)(4), 42 U.S.C. § 9620(a)(4), applies to federal contractors. Indeed, its explicit language refers only to a "department, agency, or instrumentality of the United States". Nothing in *Manning* decision prevents the state from imposing requirements on non-federal

[6] The California State Superfund Law has incorporated the definition of "hazardous substance" used in CERCLA and its regulations. Cal. Health & Saf. Code § 25316(b).

[7] SB 990 provides that "[a] response action taken or approved pursuant to this chapter for the Santa Susana Field Laboratory site shall be based upon, and be no less stringent than, the provisions of [California Health and Safety Code] Section 25356.1.5." Section 25356.1.5 incorporates the requirements of the CERCLA regulations – Subpart E of the National Oil and Hazardous Substances Contingency Plan (40 C.F.R. 300.400 et seq.) as amended." Cal. Health & Saf. Code § 25356.1.5(a)(1).

government entities with respect to the release of hazardous substances, as specifically authorized in CERCLA section 114(a), 42 U.S.C. § 9614. Accordingly, *Manning* provides no guidance for this court.

IV. THE FACIAL VALIDITY OF SB 990 IS A QUESTION OF LAW THAT SHOULD BE DECIDED INDEPENDENT OF TESTIMONIAL EVIDENCE.

Boeing's motion for summary judgment attempts to mask a straightforward facial challenge to the constitutionality of a state statute in the cloak of a complex factual dispute. Its recitation of evidentiary support, and testimonial evidence in particular, revolve around three major, but "off-the-mark" themes, none of which have any materiality to the question of Senate Bill 990's constitutional validity. First, the accusation that "politics" may have been implicated in SB 990's passage is a perplexing argument. Surely, Boeing cannot believe that legislation is enacted in the assemblies and senates of the world in the absence of politics. Certainly this Court would not hold a trial in which legislators are questioned about their motives or who they may have spoken with about this bill? Needless to say, such a proceeding likely would involve a few Boeing lobbyists along with environmental and community activists, all of whom participated in the "political" process of enacting laws, a continual spectacle that in almost every case is instigated by an interested party or two. Absent allegations of fraud, legislation enacted in a "political" atmosphere is not, for that reason, invalid.

Second, this facial challenge to SB 990 is not dependent on comparing the contamination at the SSFL with every other polluted site in California. Boeing has not cited a single decision in an environmental case where the outcome is dictated by a judicial inquiry into which toxic waste site is contaminated by which chemicals and in what amount, so that the spectrum of dangerousness to health and the environment is *completely congruent* with the stringency of cleanup remedies. At the SSFL, characterization of radionuclide and chemical contaminants remains to be completed, so attempts to "compare and contrast" presents a risk of the Court

becoming mired in the details of literally thousands of other polluted sites in California. The State has acknowledged only two truly important issues of material fact, one of which is the absence of any definitive finality in the characterization of the SSFL. Def. SUF, ¶ __. Without a sense that the nature and extent of radionuclide and chemical contamination have been studied sufficiently and are understood, SSFL cannot be compared or distinguished from other instances of pollution. And, if another site is not subject to the same rigorous attempt to protect public health and the environment, cannot this be the result of the State now taking a more aggressive posture toward pollutants? Is such a change in priorities about contamination an actionable complaint that our courts should encourage?

Third, in a similar vein, predictions of dire consequences if Boeing is forced to implement SB 990 lacks the confidence of forecasts that are done at the conclusion of necessary onsite and background studies. If Boeing's declarants possess such certainty about the effects of implementing SB 990, they are far ahead of DOE, one of the two federal agencies (the other being NASA, that have entered into administrative agreements with the State to clean up two of the four areas at SSFL, one of which (Area IV) may contain virtually all of the radionuclide contamination at the SSFL.

CONCLUSION

For the foregoing reasons, the State of California respectfully requests that it be permitted to implement a state law that seeks to ensure unlimited uses for the SSFL property and to protect the public health and the environment in the surrounding community from the nuclear and chemical debris left by Boeing's predecessors. Boeing's motion for summary judgment should be denied in its entirety.

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Respectfully submitted,

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